Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Review of Section 68.104 and 68.213 of The Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	)	CC Docket No. 88-57

FURTHER REPLY COMMENTS OF THE REAL ACCESS ALLIANCE

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SUMMARY

If there is one issue on which the Federal Communications Commission (the "Commission" or "FCC") and the parties responding to the Further Notice of Proposed Rulemaking in WT Docket No. 99-217 (rel. Oct. 25, 2000) (the "FNPRM") appear to agree in this proceeding, it is that the interests of consumers are paramount. The Commission pursues competition in the telecommunications marketplace because it anticipates that competition will lead to better service at lower rates for subscribers. Telecommunications providers are presumably in business to meet the telecommunications needs of their customers. And the Real Access Alliance (the "Alliance" or "RAA") has demonstrated - time and time again - that building owners cannot succeed if they do not ensure that their tenants have access to the telecommunications services they desire.

In these Reply Comments, the Alliance demonstrates once more that tenants in commercial buildings are receiving the services they want, and that building owners do not stand in their way when they need service from competitive local exchange carriers ("CLECs") or other providers. Knowledge Systems and Research, Inc. ("KS&R"), recently conducted a nationwide survey of commercial tenants on behalf of the Alliance. KS&R interviewed 454 respondents chosen from a random sample representing a wide range of businesses leasing space in commercial buildings of all sorts. The survey, which had a margin of error of +/-4.6%, found:

- 97% of all business tenants were "satisfied" or "somewhat satisfied" with their current telecommunications service. 94% stated that they had no telecommunications needs that were not being met at their current location.

- 91% of all business tenants were aware that they can choose alternative telecommunications providers, and 23% actually placed a request for service with such a company in the last year.

- The vast majority of business tenants who chose an alternative provider were able to receive service from the alternative provider and were satisfied with their alternative service.

- Only three respondents – one percent of the total sample -- reported that building management had ever denied a request to obtain service from a telecommunications provider not already servicing the building.

- A substantial percentage of business tenants – 39% -- would move at the end of their leases if their telecommunications needs could not be met at their current locations.

- The median lease term of respondents was three years, and the median time remaining on their leases was one year.

This survey, consistent with all the other information the Alliance has provided the Commission, demonstrates that Commission intervention in a competitive market is unwarranted. In addition, the Alliance is continuing with its voluntary initiative to develop and implement a model license agreement. The Alliance respectfully asks the Commission to urge the telecommunications industry to cooperate with the Alliance's voluntary effort, as the best way to achieve the goals of all parties. We also repeat our offer to participate in a joint study.

The remedies proposed in the FNPRM by the CLECs, by contrast, will not achieve the Commission's policy goals. In particular, the Alliance continues to believe that the remedy advocated by many CLECs is not only inappropriate but unlawful. Cutting off service to tenants in buildings whose owners do not comply with the "nondiscrimination" standard proposed by the CLECs would pose a significant threat of harm to telecommunications subscribers and therefore contradicts the Commission's goals and purpose.

In any event, the CLECs have not proposed a workable regulatory model. They completely fail to recognize that agreements for building access are agreements for the use of real estate and thus outside the Commission's jurisdiction. For that reason, the Commission cannot extend its ban on exclusive contracts to residential buildings. Furthermore, the Commission

should not regulate on the basis of protecting a particular company's business plan. Although larger CLECs aimed at serving high-end buildings might be willing to reject exclusive residential agreements, smaller companies need them to assure a return on investment. Building owners support exclusive contracts because they provide an opportunity to create viable alternatives to the incumbent providers. Mandatory access in any form will ultimately reduce competition, by forcing innovators out of the market.

In addition, the CLECs have not explained how a "nondiscriminatory" standard would work. Building owners would be faced with the prospect of entering into agreements without knowing whether they would hold up if challenged, because neither the FNPRM nor the record establish reasonable standards that an owner might use to evaluate its requirements. The Commission cannot develop a fair regulatory structure by adjudicating owners' rights in a vacuum; due process demands that the Commission first articulate some clear and rational standards.

Nor have the CLECs found a way for the Commission to regulate building access without violating the Takings Clause of the Fifth Amendment. Even "indirect" regulation would constitute a *per se* taking. The arguments put forth by the Smart Buildings Policy Project ("SBPP") in particular are circular, essentially saying that Commission would not be taking property if it restricted property rights, because if it did so, building owners would have no rights to be taken. The mere fact that the Commission has had to address the takings issue so often and in so many forms amply illustrates that it should not be treading in this field without express authority from Congress.

The CLECs also have failed to demonstrate that any of the state regulatory models are appropriate. None of the state models involves "indirect" regulation, and none is as extensive as

the approach proposed in the FNPRM. Furthermore, state regulation raises the same Fifth Amendment issues as federal regulation, and the same difficulties regarding standards and administration.

Finally, SBPP and other advocates of regulation repeatedly misstate key principles of property law. The Commission has already gone astray by applying Section 224 to facilities inside buildings, something that Congress never intended. There is no "federally granted right of access" to a building, even if a building contains utility facilities. To extend Section 224 to any area to which a utility might conceivably have access would unquestionably involve a taking of the building owner's property; utility access rights are fixed when the facilities are installed, so even if Section 224 applied, a CLEC could not use other areas of the building without compensating the owner.

In conclusion, the Commission should terminate this proceeding. The CLECs will never be viable competitors as long as they think they can run to the Commission for relief any time they have a business problem. Building owners are prepared to work with telecommunications providers to ensure that their mutual customers are satisfied and successful. But the telecommunications industry must recognize the enormous contribution that the real estate industry makes by creating markets for providers to serve, just as the real estate industry has long recognized the needs of tenants for access to telecommunications services.

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FURTHER REPLY COMMENTS OF THE REAL ACCESS ALLIANCE

INTRODUCTION

The Real Access Alliance (the "RAA" or the "Alliance")[1] submits these Further Reply Comments in response to the Further Notice of Proposed Rulemaking issued by the Federal Communications Commission (the "FCC" or the "Commission") in WT Docket No. 99-217 (the "FNPRM").[2] The comments of other parties in this proceeding – particularly the competitive local exchange carriers (the "CLECs") – make two points perfectly clear: (1) the telecommunications industry is entirely too dependent on the federal regulatory process; and (2) regulation of building access is unwarranted.

The telecommunications industry seems unable to break a habit of reliance on regulatory favors formed during long years in a monopoly environment. The CLECs in particular apparently believe that the Commission's only purpose is to guarantee their success. Of course, the CLECs disguise their self-interest by feigning concern for promoting "competition" and the welfare of building tenants. Despite numerous opportunities, however, the CLECs have been unable to demonstrate that building owners deny them access to buildings. The CLECs from the beginning have relied on nothing more than anonymous anecdotes to support their case – evidence so weak that in any other forum it would have been ignored. Having been asked to

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[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts ("NAREIT"), the National Multi-Housing Council, and The Real Estate Roundtable.

[2] *In the Matter of Promotion of Competitive Networks*, WT Docket No. 99-217, ___ FCC Rcd. ___, (released Oct. 25, 2000) at ¶ 194. The Alliance submitted its Further Comments in response to the FNPRM on January 22, 2001 (the "Further Comments").

refresh the record in the FNPRM, they have merely rehashed their original arguments and provided no quantitative data to support their claims.

Furthermore, and ultimately more important, is the lack of any evidence that tenants believe there is a problem: other than a handful of form letters, not a single building tenant has filed comments in this proceeding or a complaint with the Commission about the terms of building access. In contrast, in these reply comments the Alliance will describe the results of a new statistically-valid survey of tenants in commercial buildings, which shows that tenants receive the services they want, and that building owners are not preventing them from getting those services.

The CLECs' position might be more worthy of attention if they proposed a fair, reasonable solution fitting to a competitive market place. For example, they claim that they are willing to pay building owners for the right to occupy space in buildings. But then they turn around and say that if an incumbent local exchange carrier ("ILEC") is serving a building without paying for access, the CLEC should not have to either; since the ILECs rarely pay for access and generally treat building owners as high-handedly as they do CLECs, the truth is that the CLECs want a free ride. All parties know – and indeed have acknowledged -- that the ILECs' rights are a legacy of the past monopoly marketplace, and that building owners had no choice but to grant access on those terms. We agree that the ILECs are often uncooperative. But that does not mean that CLECs should have the benefit of the ILECs' monopoly legacy, nor even that the ILECs should continue to have it. A reasonable regulatory proposal would not seek to perpetuate the distortions of the monopoly market going forward, but to remove them.

The CLECs have had the opportunity to make their case, and have failed repeatedly. The Commission does not owe anybody a living, and it is time to cut the apron strings. While the

Alliance will cooperate with the Commission and will continue to pursue its previously-announced voluntary commitments, we again urge the Commission to terminate this proceeding.

I. RATHER THAN RELYING ON REGULATION TO ACHIEVE SHORT-TERM BENEFITS, THE COMMISSION SHOULD URGE ALL CARRIERS TO COOPERATE WITH THE RAA'S VOLUNTARY PROCESS.

In December 1998, then-Commissioner Powell spoke at a convention of the Association of Local Telecommunications Services. Commissioner Powell praised ALTS for the entrepreneurial, competitive spirit of its members, and urged the CLECs to retain that spirit, saying:

> What I urge most is that you keep to the message that heavy regulation in the long run is a hindrance to opportunity. At times, as I have observed, it is tempting to play the regulatory "game" in the way the incumbents often do. Begging for regulatory protection. Seeking regulatory favoritism that raise[s] the costs of your competitors. The "game" is fraught with uncertainty, vicissitudes and delay, subjecting your business to the whims of politicians and regulators. Relying too heavily on current regulatory distortions can provide short-term benefits, but it also perpetuates these and other distortions that will not necessarily benefit you over time.

"Local Competition .. CLECs In the Midst of an Explosion," Commissioner Powell, Before the Association of Local Telecommunications Services, (Dec. 2, 1998) at p. 6.

Sadly, the CLEC industry has ignored this advice. Rather than rely on the market and their own entrepreneurial skills, most CLECs have fallen into the very trap Commissioner Powell counseled them to avoid. Cox Communications, for example, specifically rejects "a 'free market' solution to building access problems."[3] The Alliance, on the other hand, is confident that the voluntary commitments undertaken by the real estate industry can yield great benefits. For this to happen, however, the Commission must promote the voluntary process by rejecting calls for regulation of building access. Any suggestion that regulation may be needed or

[3] Cox Comments at 14.

appropriate will only encourage the CLECs to refuse to cooperate with the voluntary commitment process.

A. The RAA Has Moved Quickly to Implement Its Voluntary Commitments and Develop the Model License Agreement.

In July 2000, the Alliance first committed itself to developing model contracts and best practices for standardizing the terms and improving the speed at which carriers obtain access to buildings. We provided specific details of those practices in September 2000, and 12 of the largest property owners in the country publicly committed to support them. Considering the size and diversity of the real estate industry, this was no small achievement.

Since making the initial commitment, the Alliance has worked very hard to develop the model lease. The Alliance retained expert outside counsel to review the terms of existing agreements and distill them into a model document. The Alliance then posted that document on its Web site, and, beginning on December 15, 2000, circulated it to the SBPP and individual CLECs for comment. The Alliance is now revising the model document and considering ways to establish the proposed clearinghouse for building access complaints. Attached as Exhibit A is a summary of the implementation steps taken by the Alliance's members, prepared by Roger Platt, Coordinator of the Alliance's Best Practices Implementation effort (the "Implementation Report").

Despite these efforts, key CLEC representatives criticize the commitments as "unimplemented," "ineffective," and "illusory."[4] AT&T claims the initiative has not been

[4] SBPP Comments at 4.

implemented expeditiously.[5] The charge that the commitments remain unimplemented is false, as described in the Implementation Report. Furthermore, the effort has barely begun. The voluntary commitments will only be ineffective and illusory if the CLEC industry refuses to cooperate.

We have done everything we can to meet our original commitment and will continue to pursue that approach diligently.

B. The RAA Has Received Valuable Comments from Telecommunications Providers Regarding the Model License Agreement, and Continues to Seek Such Comments.

Some CLECs, including WinStar and Teligent, have offered valuable comments on the model license agreement.[6] The Alliance is currently evaluating these comments and discussing them with leading real estate companies. Many have already been incorporated into the model document. We intend to incorporate additional comments and then circulate the revised draft in early March for a final review by real estate owners and telecommunications companies.

Unfortunately, as noted earlier, some parties have not participated as constructively as they might have. AT&T, as noted above, has communicated its concerns to the FCC and has chosen not to participate in the development of the model agreement. SBPP has criticized in general terms the model document in its most recent comments in this docket, even though to

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[5] AT&T Comments at 14. AT&T also lists a number of criticisms of the model agreement at pp. 13-15 of its comments. We will not address these in detail here, as this is not the proper forum for discussing the model. Instead, we urge AT&T to participate in discussions with the RAA intended to resolve such concerns.

[6] We are also gratified by the most recent comments submitted by WinStar in this proceeding, in which Winstar applauds the RAA's efforts and expresses its intention to continue to participate in the voluntary process. Winstar comments both in this proceeding and regarding the model lease have largely been constructive and are being given careful consideration by the RAA. Nevertheless, the RAA does disagree with a number of points raised by Winstar, in its FCC filing as further discussed herein.

date it has not provided any specific written comments to the Alliance. Nonetheless, as stated in the Implementation Report, SBPP has indicated that it is encouraging its members to comment individually, and we appreciate its support in this regard.

C. Commission Involvement in the Process Could Delay Development of Market-Based Solutions and Would Be Tantamount to Regulation.

SBPP insists that the Commission must participate in the preparation of the model document.[7] Commission involvement would be unnecessary and counterproductive, however, and would defeat the entire purpose of the voluntary process. The CLECs are not interested in fair, balanced, market-based solutions; they would prefer to use the threat of regulation to strong-arm the real estate industry into accepting their terms. Consequently, FCC involvement would be tantamount to dictating the terms of the model agreement. Furthermore, FCC involvement is inappropriate because building access agreements are real estate transactions and therefore outside the scope of the Commission's expertise and jurisdiction.

D. The RAA Represents the National Leadership of the Real Estate Industry, and Its Recommendations Regarding Model Documents and Best Practices Will Carry Great Weight.

The CLECs also attempt to undermine the effectiveness of the voluntary commitments by claiming that the RAA does not represent the entire real estate industry, or at least not enough of the industry to matter.[8] Nothing could be further from the truth. The combined membership of the associations that make up the RAA exceeds one million individuals and companies, and BOMA alone represents the owners and managers of more than 8 billion square feet of real estate. NAREIT represents over 95% of the publicly-traded real estate operating companies,

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[7] SBPP Comments at 3.

[8] AT&T Comments at 13; SBPP Comments at 3; Winstar Comments at 4.

including all publicly-traded office companies. The initial group of building owners committed to the best practices included a group of the largest privately-owned and the four largest publicly-held real estate companies in the country. Those companies collectively own or operate over 250 million square feet of office space – the equivalent of about twice the total office space in downtown Washington, D.C. The Alliance, through The Real Estate Roundtable, also represents senior executives of the 85 largest real estate owners, developers and lenders in the country. These individuals, as well as many others of the leading members and the senior staff of the associations making up the RAA, appear frequently at industry conferences. In that role, these individuals help inform and instruct their fellow real estate professionals, and chart the course for the industry. The Alliance, therefore, has the ability to help the telecommunications industry achieve its goals, if that industry is willing to reach a fair, mutually-agreeable, and reasonable compromise on what constitute best practices.

II. THE OVERWHELMING WEIGHT OF THE EVIDENCE BEFORE THE COMMISSION CONTINUES TO SHOW THAT REGULATION OF BUILDING ACCESS IS UNNECESSARY.

Commission action to regulate building access is unnecessary. All the available evidence demonstrates that building access issues can be efficiently resolved in the marketplace without intervention by the Commission.[9] The new tenant survey discussed below is further proof. The CLECs have offered no evidence to the contrary.

[9] *See generally* Further Comments, Part I. Attached as Exhibit B is the Declaration of Scott Lyle, Vice President of Telecommunications and Technology Services for Arden Realty, Inc., which supports the statements in the Further Comments regarding Arden's experience.

A. The Latest Survey of Office Tenants Shows that They Are Receiving Telecommunications Services from the Providers of their Choice, and that Building Owners Do Not Prevent Tenants from Obtaining those Services.

From the beginning, the Alliance has believed that a relatively simple factual investigation could establish that building access is simply not a legitimate problem. Accordingly, we have sought to provide quantitative data to prove that point.[10] The Alliance continues to believe that sound statistical survey research is the most objective and accurate method of gauging the state of the market. The Alliance again proposes that the Alliance and telecommunications industry work with the Commission to draft a survey questionnaire that would address the salient issues and concerns that the Commission has in the past felt should be answered in order to better understand the building access issue. The Alliance proposes that a reputable survey research firm acceptable to all parties be retained to conduct the survey, and that the Alliance and the telecommunications industry each pay half the cost of conducting the survey. The truth is that this is not a very complicated issue and the facts speak for themselves.

In keeping with this longstanding view, the Alliance most recently decided to get to the heart of the matter by determining whether the true beneficiaries of building access -- tenants in multi-tenant environments -- believe there is a "bottleneck" problem. The Alliance accordingly submits to the Commission the findings of its most recent survey, demonstrating that commercial building tenants are highly satisfied with the level of telecommunications services that they are

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[10] In August 1999, the Alliance commissioned a survey regarding access granted to competitive telecommunications service providers by real estate owners and managers. *In the Matter of Promotion of Competitive Networks*, Joint Comments of Building Owners and Managers Association et al., WT 99-217 (filed Aug. 27, 1999) (the "August Comments"), at Exhibit C. In response to requests for additional data made by the Commission staff during the *ex parte* period, BOMA financed and submitted an additional study regarding demand for telecommunications service by tenants and building owner responses to such demands. "Partnering in the Information Age: Critical Connections," submitted to the Commission as *In the Matter of Promotion of Competitive Networks, Ex Parte* Letter from Real Access Alliance, WT 99-217 (June 30, 2000).

now receiving.[11] This survey conclusively demonstrates that FCC regulation is unnecessary – commercial tenants are not having a problem obtaining telecommunications service from competitive providers, and building owners are not standing in the way.

The Alliance commissioned a nationwide survey of a random sample of commercial tenants, which was conducted by Knowledge Systems and Research, Inc., in January and February 2001. The survey sample included urban, suburban, and rural businesses.[12] On average, a survey respondent was located in a 2 or 3 story building, which is typical of commercial buildings across the country.[13] The survey, however, also reached consumers in much larger buildings. The respondents included retail, professional services, finance, insurance, real estate, healthcare, manufacturing, educational, government, not-for-profit, consulting, wholesale trade, construction, transportation, utilities, leisure, lodging, tourism and other service industry businesses.

The purpose of the survey was to determine the overall level of satisfaction of commercial building tenants with their telecommunications services, their awareness of alternative telecommunications providers, their ability to get service requests from alternative providers accepted and installed on time, whether building management ever denied their requests to obtain service from their chosen alternative service provider, and whether tenants would consider moving if their telecommunications needs were not met at their current location. Twelve to fifteen minute interviews were conducted with 454 senior decision makers for

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[11] Telecommunications Services Access: Business Tenant Survey, February 13, 2001, attached as Exhibit C ("Business Tenant Survey").

[12] Business Tenant Survey at 21. 53% of respondents were located in urban areas, 34% in suburban, and 13% in rural areas. *Id.* More information on the survey methodology is available on request.

telecommunications services for each business. The survey had a margin of error of +/-4.6%. The survey found:

- Almost all business tenants are either satisfied or very satisfied with their current choices of provider telecommunications service.
- Almost all business tenants are aware that they can choose alternative telecommunications providers.
- The vast majority of business tenants who chose an alternative provider were able to receive service from the alternative provider and are satisfied with their alternative service.
- Only three respondents (less than 1% of those surveyed) reported that building management had ever denied a request to obtain service from a telecommunications provider not already servicing the building.
- A substantial percentage of business tenants would move at the end of their lease if their telecommunications needs could not be met at their current location.
- The median lease term is three years, and the median time remaining on a lease is one year.[14]

Business Tenants in MTEs Are Satisfied With Their Telecommunications Service.

Commercial MTE tenants are satisfied with their telecommunications service. Of the 454 respondents, 69% are very satisfied with their telecommunications service and 28% are

[13] *Id* at 21. The average number of floors in a respondent's building was 3.6, and the median number of floors was 2.

[14] This supports the three to five year lease term reported in our August Comments at p. 7.

somewhat satisfied.[15] Only 3% of respondents were not at all satisfied with their telecommunications service.[16] Furthermore, 94% of respondents stated that their business does not have any telecommunications needs which are not being met at their current MTE location.[17]

Business Tenants Are Aware That They Can Choose to Receive Service from Alternative Telecommunications Providers.

Nine-one percent of the respondents are aware that they can choose to receive services from alternative service providers.[18] One hundred six respondents (23%) have placed at least one request for service with someone other than their incumbent telecommunications provider in the past three years.[19] Among these 106 respondents, 87% report that the alternative service provider was able to accept all of their service requests.[20] Of 100 respondents that had service requests accepted by alternative telecommunications providers, 87% report that that they received service by the agreed-upon date.[21] For those that did not receive service by the agreed upon date, on average, the problem was resolved within one month.[22]

Business Tenants Who Do Choose Alternative Service Providers Have Satisfaction Rates Equivalent to Business Tenants in the Aggregate.

Of 100 survey respondents that had their service requests accepted by alternative telecommunications providers, 66% stated that they were very satisfied with service from the

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[15] *Id.* at 8.

[16] *Id.* at 9.

[17] *Id.* at 9. Of the 26 respondents whose needs were not being met, 43% need a DSL connection, 19% want a different Internet connection, and 19% just want better service. *Id.*

[18] *Id.* at 12.

[19] *Id.* at 12.

[20] *Id.* at 13. 9% reported that some service requests were accepted, and some were denied. 2% reported that service requests were denied. *Id.*

[21] *Id.* at 14.

alternative service provider, and 24% reported that they were somewhat satisfied.[23] This satisfaction rate with alternative service providers is just slightly less than the satisfaction rate reported among all respondents (69% very satisfied; 28% somewhat satisfied). Furthermore, of these 100 respondents, 38% reported their experience with the alternative service providers was excellent or good, and 25% reported that it was smooth or easy.[24]

Business Tenants Overwhelmingly Report That Building Owners Are Not Impeding Access to Alternative Service Providers.

The survey confirms that building owners are not blocking tenant access to competitive telecommunications services. Only 3 respondents -- less than 1% of those surveyed -- answered "yes" to the question: "Has your building management ever denied a request by your company to obtain telecommunications service from a provider not already serving your building?"[25] Even if the handful of respondents who did not have the information to answer the question is factored in, the survey still demonstrates that *95% of all surveyed business tenants have never had the building management deny them their choice of telecommunications service provider*. This survey result is consistent with what the Alliance has been telling the Commission for over four years – building owners and managers are not inhibiting competition, and are not a bottleneck to building access by telecommunications service providers.

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[22] *Id.* at 14.

[23] *Id.* at 15. 10% reported that they were not satisfied at all. *Id.*

[24] *Id.* at 15. This question was asked of all 454 respondents. Although only 100 respondents reported requesting service from an alternative provider, the question was asked of all respondents because it is possible for a tenant to contact a building owner first, and decide not to submit a request to a provider if the owner has given a negative response.

[25] *Id.* at 16. 4% of respondents did not know if the building management ever denied a request to obtain service from a service provider not already providing service within the building. *Id.*

Business Tenants Are Willing To Move If Their Telecommunications Needs Are Not Met.

The risk that commercial MTE tenants will leave if their telecommunications needs are not met is significant. Thirty-nine percent of 454 survey respondents replied that they would consider leaving the MTE at lease renewal time if their telecommunications needs were not met.[26] Among survey respondents, the average commercial MTE tenant lease is 3.6 years (median term is 3 years), and the average commercial MTE tenant has 2.1 years remaining on the lease (median remaining length is 1 year). Consequently, this is a very real threat.

Some may claim that by including a broad range of respondents -- businesses of all sizes, in multi-tenant buildings of all sizes, and in communities of all sizes -- the survey somehow misrepresents the relevant market. But the CLECs cannot have it both ways. Either they want to provide facilities-based competition throughout America, or they do not. The fact is that they are primarily interested in serving large office buildings in large markets. As we have repeatedly shown, they have obtained access to a large percentage of those buildings and have achieved remarkable penetration levels in a very short time.[27] On the other hand, if they are interested in serving all kinds of customers in all kinds of markets, then the Business Tenant Survey conclusively shows that building owners do not pose a barrier.

Others may criticize the survey for including only business tenants. The residential and commercial markets, however, are very different in terms of both cost structure and revenue potential. The profit potential of direct facilities-based competition in the residential market is much lower, and consequently very few providers have expressed even the remotest interest in it.

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[26] *Id.* at 17.

[27] Further Comments at 2-34.

If the Commission doubts the reliability of the survey or wishes additional information, we will be happy to cooperate in a joint survey as proposed in our Further Comments.

B. CLECs Continue to Rely on Anonymous Anecdotes and Unsubstantiated Allegations Rather than Substantive and Verifiable Evidence.

In the FNPRM, the Commission asked for information on twelve specific issues:

> *(1) Number of buildings to which CLECs have requested access, and characteristics of buildings.*
> *(2) Number of buildings housing multiple carriers, and their characteristics.*
> *(3) Number of wireless and wireline local service providers with access.*
> *(4) Percentage of buildings in which CLECs have access and are serving.*
> *(5) Average time for negotiating access and discussion of reasons for variations.*
> *(6) Number of buildings in which a request for access has been denied, length of time for denial, and basis for denial.*
> *(7) Average time that pending requests have been outstanding.*
> *(8) Differences in negotiations or frequency of denial if LEC seeks access after specific request from tenant.*
> *(9) Charges imposed for access.*
> *(10) State nondiscriminatory access requirements.*
> *(11) Experience of owners in states with such requirements.*
> *(12) Technology developments that may reduce or obviate need for access.*[28]

Only RCN, *et al.*, the Community Associations Institute, and the Alliance even begin to answer these questions. The Alliance can only surmise that the CLECs know that the facts do not support their case.

- AT&T offered just two examples to refresh the record: (1) In Washington State, Qwest-controlled buildings have complicated building access requirements and Qwest charges line access fees three-times higher than other

[28] FNPRM at ¶ 128.

LECs;[29] and (2) BellSouth, SBC and Verizon require AT&T to use their technicians.[30]

- Cox Communications provided only the following unidentified anecdotes:
  - Cox sometimes pays building access fees as high as 5-7% of revenues or a $4,000/month flat fee.[31]
  - Cox entered into 1-2 year contracts that require turning ownership of building wiring over to building owners at end of contract.[32]
  - Building owners have refused to permit Cox access, failed to negotiate, or offered agreements that would only permit Cox access to a single customer.[33]
  - Cox has to agree to building access terms of: $400/mo.; $34,000 initial payment and $6,000 per year; 7% plus $3,000 quarter, and $1,500 up front.[34]
  - Cox had to pay separate building access fees, *e.g.*, fee to traverse land between public right-of-way and building and separate fees for building access. Cox had to pay a fee to rent wall space or equipment room. In both cases, the ILEC was not charged the fees.[35]
  - In every market, Cox has been denied access when tenant has requested service from Cox, usually because of exclusive contracts.[36]
  - "Building owners that do not wish to allow access will raise various technical or safety issues, then not permit Cox to resolve then, or will delay their responses when Cox addresses those concerns.[37]
  - Separate agreements have been required for cable and telephony service in the same building.[38]

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[29] AT&T Comments at 10.

[30] *Id.* at 11.

[31] Cox Comments at i.

[32] *Id.* Note that such a requirement conforms to the Commission's cable inside wiring rules. 47 C.F.R. § 76.804(d).

[33] Cox Comments at i.

[34] *Id.* at 6.

[35] *Id.*

[36] *Id.* at 9.

[37] *Id.*

[38] *Id.* at 10.

The Alliance points out that Cox *did not provide a single piece of identifying information for any of the above anecdotes.* No city, market area, building owner, or name was cited by Cox. Cox provided no information that would allow a party to refute, rebut, or place in context any of the anecdotes, and the Alliance has no reason to believe that information submitted in the next round of comments will be any more substantiated. For example, a $4,000 monthly fee for the right to occupy space in the World Trade Center would be a bargain. In addition, Cox does not distinguish residential from non-residential properties, and access to provide video services from access to provide telecommunications services. These are all relevant factors, because they define the relevant markets and the identity of potential competitors.

- PrimeLink described their contract with the Plattsburgh (New York) Air Force Base Redevelopment Corp., as an example of a telecommunications project into which they invested substantial capital in reliance on an exclusive contract.[39]
- SBPP noted that in return for building access, Equity Office Properties was granted stock warrants and gross revenues from OnSite Access,[40] Trizec Hahn obtain 5% of gross revenues from Broadband Office and OnSite Access for building access,[41] Vornado received 6% from Cypress Communications,[42] and Verizon has announced plans to offer fixed wireless service in addition to

[39] PrimeLink Comments at 2.

[40] SBPP Comments at 5 and fn 6.

[41] *Id.* at fn. 6

[42] *Id.*

DSL service.[43] This paucity of data can hardly be looked at as serious attempt to refresh the record and provide the Commission with updated data regarding the state of the market for building access rights.

- Sprint cited a Yankee Group report for the proposition that 20% of U.S. households are in MDUs, but only 5% of "this market" is currently served by integrated service.[44]

Of all telecommunications providers, only RCN/Utilicom/Carolina Broadband even attempted to provide responses to the Commission's inquiry.

The Alliance must continually defend the real estate industry against unsubstantiated attacks by the telecommunications industry, in the form of a relative handful of examples abstracted from a much larger base of information. We do not understand why the telecommunications industry will report the actual number of buildings to which they have gained access, the number of markets in which they provide service, the number of buildings to which they are providing service and the number of businesses to which they can now reach to the press, to their stockholders, and to the U.S. Securities and Exchange Commission, but will not report those same figures to the Commission. The Alliance has provided mountains of evidence – at considerable expense -- refuting the claims of the CLECs and showing that providers are gaining access to buildings at record rates, tenants are satisfied with their telecommunications service, and that tenants have access to competitive service providers. It should be clear by now that the CLECs have no case. We respectfully request that the Commission assign anecdotal information that is not supported by statistically valid and

[43] *Id.* at 26.

[44] Sprint Comments at 8.

verifiable evidence no more weight than should be accorded to unsubstantiated, anonymous allegations.

III. EVEN THE MOST LAUDABLE GOAL DOES NOT ALLOW THE COMMISSION TO COERCE THE COOPERATION OF BUILDING OWNERS BY THREATENING TO HARM TENANTS.

The cavalier willingness of the CLECs to threaten innocent parties with harm in pursuit of their own interest, as reflected in their proposal to terminate service to subscribers in buildings where owners fail to meet some undefined "nondiscrimination" standard, is astounding.[45] Indeed, as we discussed in our Further Comments, the mere suggestion that the Commission should order service to subscribers in noncomplying buildings to be cut off is frivolous and beyond the bounds of rational advocacy. And the fact that so-called "service providers" would propose such a solution aptly illustrates their true priorities.

AT&T claims that the economic incentives would be so strong that building owners would have no choice to comply, so the sanction would never be imposed.[46] This is cold comfort and by no means certain. The fact is that we do not know what "nondiscriminatory" means, how the existence of "discrimination" would be identified, how property owners would be given notice, or whether property owners would have any recourse. Further, given that there are tens of thousands of property owners in the country, practically none of whom have FCC counsel or monitor proceedings at the FCC, it is just a little too pat to say that "there is no significant risk that tenants would actually be denied telecommunication services."[47] Indeed, if the proposed sanction would clearly never be imposed, it would have no value as a sanction.

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[45] AT&T Comments at 17; SBPP Comments at 11; Sprint Comments at 2.

[46] AT&T Comments at 17, note 12.

[47] *Id*.

Similarly, SBPP essentially argues that if the Commission adopts rules, property owners will incorporate those rules into their business practices, and as they do so, the need for Commission adjudication will decrease.[48] We strongly disagree; Commission regulation will do nothing but promote endless litigation. Even if it were true, it begs the question of whether the Commission's rules are necessary or fair. In effect, SBPP is saying that it is acceptable to regulate building access because property owners will have no choice but to comply. Although this argument may soothe the Commission's conscience, it is neither a valid reason nor excuse for any policy.

In short, if the record were not already clear, the comments of the CLEC industry conclusively show that the CLECs are not in the least concerned with extending service to subscribers. Not only do property owners have far more incentive to meet the needs of MTE tenants than the telecommunications industry, but they have repeatedly proven the point in this proceeding.

IV. NONE OF THE COMMENTERS HAS PROPOSED A LAWFUL OR PRACTICABLE PROCEDURE FOR DETERMINING WHEN AN ACCESS ARRANGEMENT IS 'DISCRIMINATORY.'

What is "discrimination," and how can the Commission enforce such a requirement? Although the CLECs urge the Commission to adopt rules prohibiting "discrimination," they are unable to show that anything the Commission might do would be lawful or practical, much less fair to building owners.

The mechanism for indirect regulation put forth in the FNPRM is wholly unworkable, as discussed in our Further Comments.[49] Nevertheless, AT&T proposes that ILECs should be

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[48] SBPP Comments at 42.

[49] Further Comments at 52-55.

required to provide the terms of their building access agreements to CLECs, on request.[50] If the building owner refused to grant access to the CLEC on nondiscriminatory terms, the ILEC would be directed to cut off service to the building. This raises several questions.

First, who decides what the terms of the ILEC's access are? It is common, especially in older buildings, for there to be no written agreement between the ILEC and the building owner, or indeed for there to be no documentation at all. If so, what are the terms of access? What if the building owner and the ILEC in fact disagree on those terms? Does the Commission have the power to adjudicate such a dispute, which would be governed by state property law? We think not, and indeed that is the nub of the problem.[51] Access agreements are not agreements for the provision of telecommunications services. They are agreements for the use of real property, and wholly outside the Commission's expertise and jurisdiction. That a carrier with facilities in a building may use those facilities to provide exchange access is irrelevant.[52] The Commission may have the power to regulate the terms on which the carrier provides access to those facilities – but access to the building is a wholly different matter. Consequently, the Commission may be

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[50] AT&T Comments at 38.

[51] SBPP objects to any "narrow" construction of utility access rights, and then tries to imply that a proper reading of Section 224 and the state law property rights of utilities would "diminish the power of the federal government to exercise its power of eminent domain through Section 224," citing two cases to support the proposition. SBPP Comments at 28, n. 83. SBPP is intent on confusing the issue; property rights are property rights, and they are defined by state law. What SBPP really wants the Commission to do is to misread state law and define property rights too narrowly. This is essentially what the Commission has already done in misdefining "rights-of-way." The FCC cannot declare certain rights not to be property rights just because it claims to be applying Section 224.

[52] As we discussed in our Further Comments at pp. 37-49, the Commission cannot rely on Sections 201(b), 202(a) or 205 for this reason, notwithstanding the arguments of AT&T and SBPP. AT&T Comments at 17-21; SBPP Comments at 10-11. Those provisions apply only to matters related to the provision of communications service or the enforcement of the Act. The right to use real property is an entirely separate matter and outside the Commission's purview.

able to mandate the terms of access to unbundled network elements, because such arrangements do not necessarily require physical access to wiring inside a building. But if a competitor seeks direct physical access to inside wiring, it must obtain not only the right to connect its facilities to the wiring, but also the right to occupy the underlying real estate. Those are two different transactions, involving different parties.

Second, if the CLEC objects to one or more terms and alleges "discrimination," what standard will the Commission apply? AT&T does not say, although its comments imply that any deviation from the ILEC's access terms would qualify.[53] But that is not a prohibition on "unreasonable discrimination" – it is a prohibition on "reasonable discrimination" as well. One of the reasons CLECs sometimes have trouble getting into buildings is that they do not understand the need to satisfy the owner's security and safety concerns, and especially do not appreciate that the owner may have a different view of the risk associated with granting access to a new, untried, and potentially insolvent competitor, as opposed to those associated with dealing with an established incumbent. These differences are realities and are entirely reasonable things for an owner to be concerned about. Indeed, such events as the Chapter 11 filing of ICG

[53] AT&T Comments at 38.

Communications, Inc. demonstrate why this is an issue.[54] The CLECs cannot expect to be treated identically to the ILECs, because they are not identical to the ILECs.

And how practical would it be to require exact equality of terms in other respects? What if a carrier only needs access to the rooftop? Is it "unreasonable discrimination" for the owner to limit a carrier's rights to parts of the building different from those occupied by the ILEC? What if the ILEC does not have or want access to the rooftop? Would a CLEC then insist that it be given access under some "technologically neutral" standard? The possibilities are endless. The Commission simply does not have enough information to establish detailed rules at this point, yet that is what would be needed for owners to protect their interests. The Commission cannot rely on individual adjudications under a standard as vague as "unreasonably discriminatory," especially in an area in which its legal authority is so weak in the first place.

In other words, there would have to be explicit and detailed standards for what constitutes "unreasonable discrimination." But nobody has proposed any, which raises a third question: If a building owner does not know what the standard is for "unreasonable discrimination," how can the owner protect itself against the "nuclear sanction" of service termination? The owner will

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[54] Another example is the latest shelf registration filed with the Securities and Exchange Commission by XO Communications, which states:

> We expect that losses and negative cash flow from operations will continue over the next several years. Our existing operations do not currently, and are not expected in the near future, to generate cash flows from which we can make interest payments on our outstanding notes, make dividend payments on our outstanding preferred stock or fund continuing operations and planned capital expenditures. We cannot know when, if ever, net cash generated by our internal business operations will support our growth and continued operations.

Eric Winig, "XO's shelf registration may be cause for concern," Washington Business Journal (Feb. 16-22, 2001) at p. 4.

never know, in negotiating with a CLEC, what it can or cannot do. Yet if it denies access, the owner faces the prospect of some day finding that telephone service has been cut off, or will be if the owner does not sign whatever the CLEC puts on the table. So the bottom line would be that, without standards, the only safe thing to do is give the CLEC whatever the CLEC asks for. This would not be a fair regulatory scheme – indeed, it would be arbitrary and unjust. The Commission should not be a party to such naked, self-interested coercion.

And this raises a fourth question: Even if standards are established, how will the Commission protect the owner's procedural rights? AT&T, SBPP and others claim that the Commission can rely on Section 411 to bring a building owner into a proceeding. As we discussed in our Further Comments, this is just not so.[55] Section 411 was intended to deal with the relations of a carrier with its customers and other carriers. A Section 411 proceeding must deal with "the enforcement of the provisions of [the] Act," and the whole reason the CLECs have been forced to propose indirect regulation is that the Act does not apply to building owners or to agreements between building owners and carriers for the right to use or occupy real estate.[56] Thus, the Commission is being asked to interfere in the relationship between a building owner

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[55] Further Comments at 45-49.

[56] Unable to cite to any relevant authority under the Communications Act, SBPP is forced to cite irrelevant decisions. For example, *GSA v. AT&T*, Order, 2 FCC Rcd 3574 (CCB, 1987) has nothing to do with this case. It stands only for the proposition that the Bell Operating Companies are successors in interest to the original AT&T in certain instances, and thus can be brought before the Commission under Section 411. The ICC cases cited by SBPP do not support the proposition that a building owners is a person interested in or affected by a practice as required by 47 U.S.C. § 411(a). In general, the ICC cases deal with shippers and carriers, not third parties. In *United States v. Baltimore & Ohio RR*, 333 U.S. 169 (1948), the issue was not access to property, but access to track, which is not the same thing. In *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), a provision of the Interstate Commerce Act was held to permit an injunction to be issued preventing the City from enforcing racial segregation laws. The FCC does not have the power to issue injunctions, nor are the issues in building access remotely comparable to those in civil rights cases.

and an ILEC – a relationship that is at bottom nothing more than a real estate license or something similar – without telling the owner in advance what it can or cannot do, and without the ability to ensure that the property owner has a chance to explain the reasons for its actions or its interpretation of any relevant arrangements. This sort of situation was never contemplated by the Communications Act.

In sum, we still do not know what constitutes "discrimination," and the Commission has no lawful way of applying any standard it might develop.

V. IN URGING THE COMMISSION TO FURTHER DISTORT THE MEANING OF SECTION 224, VARIOUS CLEC COMMENTERS MISSTATE AND OVERSIMPLIFY KEY PRINCIPLES OF REAL ESTATE LAW.

As we noted in the Further Comments, the FNPRM's interpretation of Section 224 is based on a misunderstanding of the term "rights-of-way." Failing to acknowledge that "rights-of-way" is a term of art, the Commission redefined the term to suit its own ends, declaring that a "right-of-way" is a "publicly or privately granted right to place telecommunications distribution facilities on public or private premises…."[57] To avoid taking the property of building owners, the FNPRM limits the right to attach under Section 224 to property that a utility can grant access to and obtain compensation for,[58] but this does not avoid the consequences of the erroneous definition.

In the process, the FNPRM misconstrues the effects of our argument that building access rights consist of leases, licenses or easements, and not rights-of-way. Our point was that a "right-of-way" encompasses certain legal rights, and that the kinds of rights granted by a "right-of-way" do not exist inside buildings. Therefore, by definition, Section 224 cannot apply to the

[57] FNPRM at ¶ 79.

[58] FNPRM at ¶ 87.

right to enter a building. The FNPRM seems to miss this point. Instead, asserting that "the nature of a right of access, and not the nomenclature applied, governs . . . .", FNPRM at ¶ 82, the FNPRM concludes that the general purpose for which an access right is being used controls, rather than its underlying legal nature. But this logic leads the FNPRM to misstate the actual meaning of the term "rights-of-way," and implies that any right of access might be considered a "right-of-way," regardless of how that right was created or defined.[59] We agree that names alone are not determinative, but names – when properly used – do describe legal rights. Thus, a "right-of-way" does not grant access to a building, because of the nature of the rights created when a right-of-way is created. Similarly, licenses, easements and leases may be used to grant access to a building, but the actual legal rights conveyed differ. Thus, when a name properly describes a legal right, the use of the name has important consequences.

The FNPRM's logic has encouraged the CLECs to argue that they should be permitted to install facilities anywhere in a building if an ILEC or other utility is present in the building.[60] Apparently, the CLECs believe that the FNPRM has defined a right-of-way to include any access right in a building, no matter what legal rights are contained in the access grant. For example, SBPP claims that this approach will not take the owner's property, but will only affect the utility's rights, and the utility would be compensated under Section 224. This, of course, assumes that the utility always has a property right for which it can be compensated. It also assumes that access rights are not limited to specific areas. Both assumptions are false. A

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[59] Note that this does not appear to be what the FCC intended, because the FNPRM also requires that a provider have the consent of the building owner before occupying a building. FNPRM at ¶¶ 87, 90. Thus, the FNPRM appears to separate access to the property from access to the facilities. While we agree with that separation, there appears to be some contradiction between the FNPRM's logic supporting the existence of right-of-way inside buildings and some of the consequences of that conclusion.

[60] *See, e.g.*, SBPP Comments at 21.

correct understanding of Section 224 and the meaning of "rights-of-way" would avoid these problems.

A. As a Matter of Property Law, There Are No Rights-of-Way Inside Buildings.

SBPP urges the Commission to ignore "state law constructions of . . . access rights."[61] This is not surprising, given the Commission's apparent willingness to ignore state law in determining what constitutes a "right-of-way." SBPP then goes even further and asserts that "[w]here there is no written agreement between the utility and the building owner . . . it is likely that the utility has the right to all areas of the MTE . . . ."[62] This is simply not the law,[63] and SBPP therefore cannot cite any authority for the proposition.

The term right-of-way has two simple meanings: it can refer to either the unimpeded right to pass over another's land, or the strip of land used to exercise the right.[64] This right has never been understood to apply to a right to enter a building. Indeed, the FNPRM cites no authority whatsoever for that proposition. It is true that a right-of-way can take the form of an easement, but that does not mean that all easements are rights-of-way, nor does it mean that an easement that extends inside a building is a right-of-way. In fact, because of the degree of control exercised by a property owner, it is simply impossible for a building access right, however denominated, to be a right-of-way. The right to enter a building is always subject to interference: a building owner may close and lock the building; may limit after-hours entry to its

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[61] SBPP Comments at 28.

[62] SBPP at ¶ 28.

[63] Comments of Florida Power and Light at 7-8.

[64] *See* Reilly, The Language of Real Estate (2d ed. 1982) at 418; *Kalinowski v. Jacobowski*, 100 P. 852 (Wash. 1909) ("right-of-way" is the right "to travel over a particular tract of land without interference"); 65 Am. Jur. 2d, Railroads § 50.

employees or tenants; may limit entry by service personnel to certain hours or conditions, such as by requiring that they be escorted; and so on. Because there is no right of unimpeded access inside a building, there is no right of passage that conforms to the definition of a "right-of-way." Furthermore, there can be no physical strip of property associated with a right of passage that does not exist.

The Commission cannot ignore state property law by converting specific grants to one entity into general rights of access. The fact remains that there are no rights-of-way inside buildings, as a matter of law. Consequently, the Commission cannot convert any particular grant of access into a right for a third party to install facilities anywhere it chooses.

B. By Its Terms, Section 224 Does Not Apply to Facilities Inside Buildings.

Despite having defined "rights-of-way" incorrectly, the Commission did correctly conclude that property owners have the right to prevent competitive providers from obtaining access to buildings.[65] SBPP's assertion that the "plain language" of Section 224 mandates access over an owner's objections is utterly unfounded.[66] There is simply no "federally granted right of access."[67] Nevertheless, the Commission has invited this type of argument by failing to recognize that Section 224 was never intended to apply to any facilities inside buildings.

Section 224 contains no reference to building access or the right to enter or use buildings or the property of any person other than a "utility." The statute only grants rights with respect to facilities owned or controlled by utilities, and the statute and the legislative history make it clear that Congress intended to allow cable companies – and later CLECs – merely to take advantage

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[65] FNPRM at ¶¶ 87, 90.

[66] SBPP Comments at 29.

[67] SBPP Comments at 30.

of existing transmission facilities. The Commission has failed to see that there is a fundamental distinction between access to true "rights-of-way" and access to a building. Building owners invest enormous amounts of capital to create attractive environments for people to work, shop, and live in. They incur equally large expenses in maintaining those environments, and manage every detail, from aesthetics, to the services available to tenants and the mix of tenants, all intended to ensure the profitability of the investment both for themselves, and in commercial buildings, for their tenants. This is far different from the nature of the property Congress intended to address in Section 224. The rights-of-way encompassed by Section 224 exist for only one purpose: to allow the installation of various types of transmission facilities. Once a telephone line leaves a right-of-way and enters a building, it is occupying a fundamentally different kind of property.

SBPP makes several arguments that distort the language of Section 224 and other provisions of the Act beyond recognition. For example, SBPP argues that Section 224(f)(2) only allows a utility to deny a carrier access to rights-of-way where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." SBPP Comments at 29. From this, SBPP reaches the startling conclusion that Section 224 requires the Commission to order building owners to allow CLECs access to buildings. Of course, the law says nothing of the kind. The reasons listed in Section 224 do not include owner consent because Congress never imagined that Section 224 would be applied in a context in which other issues might be relevant. As noted by SBC,[68] Section 224(e)(2) and (3) provide that the cost of providing space is to include both an element for usable space and an element for unusable space. Under that formula, access to a building would seem to require an apportionment of the

[68] SBC Comments at 7.

cost of maintaining the entire building, since the area outside the area of the immediate attachment would constitute the unusable space. Of course, that really makes no sense in this context, which is exactly the point. The statute assumes that the attaching entity will only be dealing with the utility that owns or controls the poles, and further takes as a paradigm the case of a telephone pole. If Congress had meant to authorize regulation of rates for building access, it would have recognized that this would raise far different and more complex issues. It is also critical to remember that the Pole Attachment Act was a response to the Commission's conclusion that it had no power to regulate the electric companies and other utilities that owned the poles; surely if Congress had meant to include facilities and access rights inside buildings it would have said so, if only to avoid any future ambiguity regarding Commission jurisdiction over building owners.

On the general grounds of promoting competition, SBPP would have the Commission extend the definition of "right-of-way" to include areas that "could" be used by incumbent utilities, even if they are not. SBPP provides no legal authority for this expansion, however. It is true that the Commission has taken steps in the past to promote competition in various arenas, but that is beside the point. The mere goal of promoting competition is not a grant of authority from Congress. The fact that the Commission adopted a regulatory scheme for certain wireless services outside the scope of Title II has absolutely no bearing on this case; nobody has questioned the Commission's power to regulate the wireless industry: the trouble is that the Commission cannot and should not regulate the real estate industry. Furthermore, SBPP would have the Commission reinterpret existing utility access rights without regard to what they actually permit under state law. To that extent, even if the Commission's underlying decision to apply Section 224 inside buildings were lawful, the proposed extension would not be.

In addition, SBPP has asked the Commission to adopt rules in direct defiance of the 11th Circuit's decision in *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *reh'g en banc denied*, 226 F.3d 1220 (11th Cir. 2000), *cert. granted, FCC v. Gulf Power*, 2001 U.S. LEXIS 953 (2001) and stay their effectiveness until the Supreme Court decides the case.[69] As the law now stands, however, wireless providers are not entitled to the benefits of Section 224, so what SBPP asks is simply illegal. The Commission cannot disregard the clear holding of a federal appellate court; issuing rules would amount to a rejection of the 11th Circuit's authority, even if the rules never became effective. The Supreme Court has not reversed the 11th Circuit and very well may not – SBPP's proposal thus is wholly inappropriate.

Finally, SBPP refers to the Commission's interpretation of Section 222(e), which specifically authorizes the Commission to establish reasonable rates for subscriber list information. The Commission has acknowledged that Section 224 does not apply to building owners, so there is no parallel here: the FCC cannot regulate rents charged by building owners under Section 224. SBPP also cites to the Commission's questionable expansion of the OTARD rule. The application of the OTARD rule to leased property is under review, and the recent expansion is subject of a petition for reconsideration. Unless affirmed by a court, which is doubtful, the OTARD decision has no precedential value.

VI. THE FIFTH AMENDMENT REMAINS AN INSURMOUNTABLE OBSTACLE.

The Fifth Amendment obstacles to the rule set forth in the FNPRM were discussed in depth in our Further Comments. The other comments submitted to the Commission raised only a few substantive points on this topic to which we respond below.

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[69] SBPP Comments at 21.

A. Prohibiting All Carriers From Serving A Building Constitutes A Taking.

As set forth in our Further Comments, the Takings Clause provides absolute protection against uncompensated *per se* takings, including the government overriding a property owner's right to exclude others from his property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Despite this, SBPP makes two illogical claims: (1) that a rule that would exclude all carriers – by preventing them from serving a noncomplying building – does not effect a taking; and (2) that such a rule would not compel building owners to comply in a manner that would effectively constitute a taking.[70]

SBPP's arguments, however, put the cart before the horse. They assume that FCC regulation is the natural order of things and ignore the effect of regulation on the preexisting property rights of building owners. A rule prohibiting any telecommunications provider from serving a building that does not grant nondiscriminatory access to all telecommunications providers still effectively overrides the building owner's constitutionally protected right to exclude *some* carriers from the building. That right exists now, it is protected by the Fifth Amendment, and it would be lost if the Commission adopted SBPP's proposals. Similarly, if a government rule compels compliance to avoid the destruction of the market value of a building, compliance cannot be said to result from market conditions: the regulation itself creates the market conditions, and therefore creates the taking. SBPP's arguments are pure sophistry and betray the weakness of SBPP's position.

Several parties have argued that the FNPRM raises at most a regulatory taking issue, not a *per se* taking issue, by erroneously relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, mobile home park owners challenged a rent control ordinance imposed by California,

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[70] SBPP Comments at 17-18.

asserting that it amounted to a physical occupation of their land. The Supreme Court rejected that argument, holding that limiting the bases upon which mobile home park owners could terminate a mobile home owner's tenancy did not amount to a physical invasion since the park owners had voluntarily rented their land to the mobile home owners in the first place, and the ordinance did not require the park owners to continue to rent their property to mobile home owners. *Id.* at 528.

The Court's holding in *Yee*, however, is inapposite to the Commission's proposed rule. First, *Yee* is distinguishable on its face. Unlike the FNPRM's proposal, the ordinance in *Yee* did not require the park owners to rent spaces to any mobile home owner just because it chose to rent to one mobile home owner. Thus, *Yee* is at best applicable only by analogy, and as an analogy, it is unconvincing.

In *Yee*, in response to the ordinance to which they objected, the park owners were not only free to discontinue renting their property to mobile home owners, but after those tenants were removed, they could instead put what would be vacant land to another use. While it is true that the proposed rule would not "require" building owners to grant all telecommunications providers access to their property, a decision by an owner not to do so would prevent *any* telecommunications provider from providing services to the building, thereby destroying the economic value of the building — no tenant would rent space in an office building that did not have telephone service.

Thus, if the FNPRM proposal is adopted, a building owner would have to choose one of three draconian options: (1) comply with the rule by providing nondiscriminatory access to all providers and thereby consent to the taking of its property; (2) refuse to provide nondiscriminatory access, thereby destroying the economic value of the building; or (3) raze the

building and locate another money-making enterprise on their property which either (a) is not covered by the FNPRM or (b) does not need telephone services. While the third option may seem theoretically to squeeze this situation into the exception that was critical to the Court's decision in *Yee*, it does not do so practically. A commercial office building or an apartment building is not vacant land and, having to raze either represents a drastic — and unacceptable — price to pay. Therefore, the appropriate analysis is of the regulation is as a *per se* taking, not as a regulatory taking, since the effect of the rule would be to require building owners to submit to a physical invasion of their property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 527 (1982).

B. SBPP's Comments Demonstrate That The Value Of The Taking That Would Be Effected By The Commission Regulation Would Amount To Billions Of Dollars.

The rule set forth in the FNPRM improperly values the benefit that telecommunications providers would obtain by nondiscriminatory access to buildings. While some comments have suggested that requiring providers to pay building owners compensation would satisfy the government's liability under the Takings Clause, it would not. Two reasons as to why such a requirement is insufficient were detailed in our opening comments — "(1) the Commission lacks the requisite statutory authority to engage in a taking and to establish a compensation mechanism to be funded by the carriers; and (2) even if the Commission had such authority, the Notice has failed to specify a compensation mechanism that would satisfy Takings Clause requirements."[71] As further explanation as to why the FNPRM has failed to specify a compensation mechanism that would satisfy Takings Clause requirements, and to refute those comments that argue that the mechanism set forth in the FNPRM is sufficient, one additional example is useful.

It has been suggested that appropriate compensation would be based on the square foot rental the owner obtained in the building and the amount of space a carrier would use inside the building. This formula would not fairly compensate the building owner, however, since the value of providing access to the building is not simply being able to use the square footage made available to the carrier, but to gain access and provide services to the tenants in the building who use telecommunications services.

The following example illustrates this point. Suppose that the Commission imposed a requirement that if the recent NBA All-Star Game permitted one LEC to advertise by placing a two-foot by three-foot banner in the MCI Center, it would have to permit all LECs to advertise by placing a two-foot by three-foot banner in the MCI Center — and that the charge would be based on the size of the banner and a fair rental rate based on the rental charge that the MCI Center was charging the NBA to use the facility. The value to the LECs of advertising is not based on the square foot rental charge of the MCI center, but rather on the audience that sees the banner during the game.

Much in the same way as the NBA should be allowed to be compensated for its efforts in putting together an event with such a large audience, a building owner should be permitted to be compensated for its efforts in putting together a building of tenants which LECs want to serve. A fair valuation of those efforts is not based on a square footage rental, but rather on other factors such as, the number and type of tenants, the density of telecommunications users in the building, and the number of hours that the offices use telecommunications services — the higher these factors are, the greater the benefit to an LEC of being given access to the building regardless of the square foot rental the building owner charges its tenants.

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[71] Further Comments, App. H at 12-13.

Moreover, according to comments submitted by SBPP, the value of the market for local telecommunications services in buildings that would be subject to any rules "will probably be a $36 billion market."[72] The value of this market is further indication that the proposal set forth in the FNPRM and supported by some of the commentators would not fairly compensate building owners. At a typical rent of 5% gross revenues, comparable to shopping center rents and the cable franchise fees permitted by the Act, the CLECs effectively propose a taking of property worth roughly $1.8 billion.

In sum, none of the commenters comes close to providing the Commission with a way of evading its obligations under the Fifth Amendment.[73]

VII. EXCLUSIVE CONTRACTS ARE VITAL TO ENSURING THE LONG-TERM PROSPECTS FOR COMPETITION IN THE RESIDENTIAL MARKET.

Exclusive contracts are often the only way to overcome the inherent economic barriers that inhibit competitive provision of advanced telecommunications service in hard-to-serve residential buildings. For that reason, the Commission should not ban them.[74]

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[72] SBPP Comments at 7 (*citing* Mark Rockwell, *BLEC's Two Sided*, tele.com at 1 (Oct. 24, 2000).

[73] In this regard, we note that, contrary to the Comments of AT&T at n. 19, the rule of *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) is alive and well. The D.C. Circuit reaffirmed the rationale of that case in *GTE v. FCC*, 205 F.3d 416, 420 (D.C. Cir. 2000). Therefore, the mere fact that the Commission has had to repeatedly consider the Fifth Amendment issue and correctly expressed concern over the possibility of a taking is sufficient to foreclose regulation.

[74] We note that in the cable inside wiring proceeding, CS Docket No. 95-184, the Commission acknowledged that exclusive contracts may be pro-competitive in the video service market. Many commenters appear to be addressing video issues in this proceeding. We believe the issues and economic incentives are largely the same, but the Commission should not act without understanding that it is dealing with different services in different markets, and not all the commenters are being as clear about their goals and concerns as they might be. In any case, because the focus of this proceeding has been on telecommunications, any action that might affect the video market should be dealt with in the context of the cable proceeding.

In previous filings, the Alliance and other parties submitted evidence that exclusive contracts were valuable and necessary to enable competitive providers to overcome the dominant market position of incumbent providers.[75] In response to the FNPRM, the Alliance questioned both the need to extend the ban, and the Commission's general authority to do so.[76] Other parties focused on the evidence that exclusive contracts are necessary to maximize the economic feasibility of providing service to what we will refer to as 'second-tier' residential buildings, *i.e.*, (i) smaller apartment buildings, (ii) apartment buildings in smaller, less densely populated areas, and (iii) buildings with tenants who are unlikely to pay for high-end bundled service packages.[77] Provision of advanced telecommunications service to 'second-tier' residential buildings will not occur without the benefits that exclusive contracts provide -- it is simply too expensive to build out these buildings without some means to equalize the higher per-customer cost.[78]

Some parties, however, have complained that incumbent providers are now using exclusive contracts to further leverage their entrenched market dominance.[79] Led by RCN, these commentors urge the Commission to extend the ban on exclusive contracts to residential buildings. These parties also make clear that their business plans for the residential market are designed to keep per-customer costs low by primarily marketing high-end bundled service packages to tenants residing in relatively large residential buildings in densely populated areas.[80]

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[75] *See, e.g.*, Declaration of Lyn Lansdale, Exhibit E to Further Comments.

[76] Further Comments at 62-65.

[77] CAI Comments at 2, CoServ Comments at 3-4, ICTA Comments at 12-13.

[78] ICTA Comments at 11.

[79] RCN Comments at 14-17.

[80] *See* RCN Comments at fns 14, 17.

Overall residential building tenant satisfaction with the availability, quality, and price of their telecommunications service should be the paramount interest of the Commission. RCN, however, wants the Commission to adopt regulations that support its business model, which is to build large networks and sell higher-priced bundled services in large apartment buildings.[81] Smaller competitive service providers want the Commission to adopt regulations that support their business model, which is to provide discrete services to all tenants in a smaller number of "second-tier" buildings (although they will serve larger, more lucrative buildings if the opportunity arises).[82] RCN wants to sell its bundled service, and therefore has trouble getting into buildings where the cable operator or another provider is providing a single service on an exclusive basis. Instead of examining business models, however, the Commission should determine whether tenants, not service providers, benefit from exclusive contracts. Unless and until the Commission has conclusive evidence that the use of exclusive contracts is harming the ability of residential tenants to receive advanced telecommunications services, the Commission should not attempt to extend the ban on exclusive contracts to residential buildings.

The Commission must also consider the highly diverse and fragmented nature of the apartment market. The apartment market is essentially a collection of 25 or more sub-markets, each with unique demographic characteristics: luxury, higher income, upper middle income,

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[81] RCN Comments at 9. RCN quotes the Commission's characterization of its business plan with approval: "RCN's business plan, for example, is 'dependent upon delivering bundles of services thus generating multiple revenue streams and higher penetration rates...[by]... entering markets with high population densities, thus lowering the per customer cost of offering service.'" RCN Comments at note. 15. Similarly, Carolina Broadband states that they are focused on gaining access to the largest buildings in each market. RCN Comments at 7.

[82] For example, CoServ is a small Texas-based competitive provider that relies on acquiring exclusive access to buildings, in return for offering the tenants reduced rates, state-of-the-art technologies and service, etc. CoServ Comments at 3. Unlike RCN or Carolina Broadband, the bulk of CoServ's assets are sunk in the building. CoServ cannot benefit from access to unlimited buildings; its business model requires making the most out of each individual building. *Id*. at 4.

lower middle income, upper low income, low income, high-rise, mid-rise, garden, rural, suburban, small city, large city, and so on. The size, location and income profile of a building all affect its attractiveness to video providers. Consequently, one set of rules could have a devastating effect on competition in many of those sub-markets. If the FCC adopts rules that favor RCN's strategy, it may advance competition for the 20% or so of buildings at the high end, but at the cost of disrupting competitive forces operating in the remaining 80%.

To the extent that permitting the use of exclusive contracts presents some possibility of abuse by incumbent providers, any abuse could be curbed by such measures as prohibiting incumbent providers from unilaterally imposing exclusive access as a condition of service; and shortening the term of exclusive contracts to the period necessary for a provider to recover its investment.

RCN appears to have some evidence of such abuse.[83] RCN's comments, however, do not change the fact that exclusive contracts remain vital to the efforts of building owners to attract, and competitive service providers to offer, advanced telecommunications service in 'second-tier' residential buildings. Small competitive service providers are only willing to serve 'second-tier' residential buildings if building owners grant the exclusive access that makes such service economically feasible. In return, as the comments demonstrate, competitive service providers are willing to offer tenants innovative, specially-tailored, and/or specially priced telecommunications and video service packages.[84]

RCN asserts that lack of choice itself justifies prohibiting exclusive contracts entirely. There is no argument that one purpose of the 1996 Act was to encourage competition and growth

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[83] RCN Comments at 5-8.

[84] ICTA Comments at 11-12.

of competitive services. But if the Commission were to eliminate exclusive contracts, consumers would lose access to a range of other providers that rely on the exclusive contract to serve 'second tier' buildings. Several parties stated that extending the ban on exclusive contracts to residential buildings would result in making it difficult to provide certain buildings with telecommunications service. PrimeLink argues that small and rural providers should be permitted to maintain exclusive contracts.[85] PrimeLink has entered into a contract to provide exclusive telecommunications service to an Air Force base that is currently being redeveloped. PrimeLink spent $3 million in reliance on an exclusive contract, and also obtained a $10.5 million loan in reliance on that contract. The Community Associations Institute supports exclusive contracts because they benefit condominiums and homeowner associations.[86] And finally, several parties note that their exclusive contracts were obtained through a competitive bid process and that there are specific benefits that they can only obtain through use of exclusive contracts.[87] In the video provider context, in previous filings, the Alliance provided the Commission with evidence that exclusive contracts permit building owners to negotiate for special cable package features, from addition of A&E to the basic cable package for seniors living in retirement communities, to movies-on-demand channels in buildings with primarily young professionals as tenants.

Furthermore, although RCN attacks the use of exclusive contracts, RCN engages in the practice itself.[88] And there is no evidence that RCN would be willing to make the investment to

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[85] PrimeLink Comments at p. 3.

[86] CAI Comments at 2.

[87] Educational Parties Comments at 10-11; County of Los Angeles Comments at 4, 7-8; U.S. Dept. of Defense Comments at 2, 4-6; IMCC Comments at 5-6.

[88] Bruce Mohl and Patricia Wen, "Sweetheart Deals Said to Limit Choices for Net, Phone, Cable," Boston Globe (Jan. 30, 2000), p. B2.

compete head-to-head in a building already served by an ILEC or cable MSO. RCN might be willing to in the largest, most lucrative buildings -- but not in the bulk of apartment buildings in the country. In determining whether or to extend the ban on exclusive contracts to residential buildings, the Commission must weigh the common or collective good enjoyed by all tenants in a residential building when an exclusive contract is negotiated for their benefit, against the individual good of the privilege of a few service providers to serve a few residents within a building. In other words, by agreeing to accept one provider, smaller or less desirable residential buildings may be able to receive comparable services to those offered in large residential buildings, services which might otherwise not be available. For smaller competitive service providers, who offer lower priced packages and rely on quantity on subscribers to become profitable, exclusive contracts are essential to survival.[89]

This form of bundling tenants together to receive better pricing is similar to the bundled service pricing plan offered by RCN. If a tenant agrees to forgo use of other providers, and accept RCN as his or her single provider for local telephone, long distance, cable and internet access, RCN will offer the tenant substantial discounts.[90] RCN further contends that if an incumbent is permitted to enter into an exclusive contract to provide any communications service, the new facilities-based entrant will be foreclosed from the market because the new entrant must be able to compete for all potential services.[91] RCN asks the Commission to prevent residential building tenants from receiving any of the current benefits under an exclusive contract on the grounds that someday a new facilities-based entrant might want to connect a

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[89] CoServ Comments at 5.

[90] RCN Comments at 9. "For example, RCN's bundled service offering, called Resilink™, offers subscribers substantial discounts for subscribing to more than one service."

[91] RCN Comments at 13-14.

particular residential building, but only if the new entrant can be assured of the possibility of selling a full bundle of services. RCN ignores the possibility that either through competitive bid, or by shopping around, it is possible that the building owner chose the best package it could find, and agreed to the exclusive contract provision to reduce rates even more.

The Telecommunications Research Action Center ("TRAC") opposes exclusive contracts because they limit the provision of telecommunications services to renters, who TRAC states are predominately poor and non-white.[92] The trouble with this argument is that most competitive service providers are not interested in serving buildings with low income residents. For example, RCN wants to provide bundled services because its average per customer revenue jumps from $88 per month for a la carte services, to $125 per month for provision of bundled services.[93] The only way a service provider will have an incentive to serve buildings with low-income residents is if it can be assumed that it will have a large customer base in the building, to make up for the lower rates residents will be able to afford.

RCN contends that existing systems will not be upgraded without the threat of competition, and that exclusive contracts provide "powerful weapons that preserve a *status quo* for providers of outdated and overpriced network facilities."[94] The Alliance agrees that shortening the length of exclusive contracts to the period necessary to provide a reasonable return on investment would be a sensible change.[95] But otherwise, RCN provides no evidence that exclusive contracts do not provide competitive service providers with incentive to build new

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[92] TRAC Comments at 2.

[93] RCN Comments at fn. 17.

[94] RCN Comments at 12-13.

[95] Although this begs the question of what that term would be, how it would be computed, and whether the FCC is equipped to deal with the issue.

networks by ensuring that they will be able to recover their investment. In fact, other comments provide evidence of exactly this point.[96]

Finally, the Alliance would also like to correct two misstatements made by RCN in its comments. It is the service provider that usually requires the residential MTE owner to grant the provider exclusive access as condition of providing service, not the other way around. Residential building owners enter into exclusive contracts because the service provider requires exclusive access to ensure that it will generate enough market share within the residential building to recoup its capital costs and reasonable profit.[97] In other cases, where competitive service is not available, the owner may have no choice but to agree to an exclusive access condition as required by the incumbent service provider. In either case, there is no stunning "rush to sign exclusive contracts by MTE owners."[98]

Second, RCN states building owners cannot be expected "to act in their tenants' best interests."[99] As stated in previous comments to the Commission, building owners have strong economic incentives to satisfy the telecommunications needs of their tenants. Revenues from telecommunications-related services represent only a tiny share of overall building income, and the loss of even one resident because of poor telecommunications service would be just too costly. The bulk of building income is derived from rent. The only way for building owners to keep their vacancy rates low and their rents at market, is to accommodate the needs of their tenants.

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[96] PrimeLink Comments at 2.

[97] ICTA Comments at 10.

[98] RCN Comments at iii.

[99] RCN Comments at 18.

The bottom line is that some limited evidence has been provided to demonstrate that some providers are being denied access to relatively large residential buildings. No evidence has been provided to demonstrate that tenants are being denied services from a provider with an exclusive contract that they would otherwise receive from an alternate provider. Yet strong evidence exists to demonstrate that exclusive contracts enable smaller buildings, which would not otherwise be financially attractive to competitive service providers, to negotiate innovative service packages for their tenants. Over 50% of apartment properties have 50 units or less. Exclusive contracts remain vital to the efforts of building owners to attract competitive service for their residential tenants. The Commission should not prohibit exclusive contracts without substantial evidence that the majority of residential tenants are harmed by the use of exclusive contracts.

VIII. COMMENTERS GENERALLY OPPOSE REGULATION OF PREFERENTIAL MARKETING ARRANGEMENTS.

Nearly all of the commenters support preferential marketing arrangements, including some who would ban exclusive contracts.[100] The Alliance shares the view that preferential agreements allow providers to differentiate themselves and thereby promote competition.[101] The Commission should not attempt to regulate preferential agreements.

IX. STATE BUILDING ACCESS REGULATIONS ARE NOT APPROPRIATE MODELS FOR COMMISSION ACTION.

The FNPRM requested comments on state rules regarding access to buildings. Interestingly, few of the commenters discussed those rules. There appears to be no consensus

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[100] *See* Comments of RCN, AT&T, SBC.

[101] *See* Comments of PrimeLink, CAI, ICTA.

even among the CLECs on this issue. In any case, the state models are all flawed because they ignore the economics of serving buildings, especially residential buildings. They assume, with little analysis, that forced access will yield competition, without considering the fact that in most cases multiple providers actually will not be able to serve residential buildings profitably. The most important thing that can be said about activity at the state level is that the vast majority of states have seen no need to adopt such rules.

A. Texas.

SBPP endorses the Texas model without noting the contradiction between that model and SBPP's stated position. The Texas rules apply only after a tenant has requested service from a particular provider, and do not give providers the right to preposition their facilities. If this is "satisfactory" to SBPP,[102] we wonder why SBPP continues to insist on "nondiscriminatory " access without a tenant request. We also note that the Building Tenant Survey as well as substantial information already in the record show that building owners respond to tenant requests for service. SBPP also ignores the fact that the Texas rules were adopted under express authority granted by the Texas legislature.

In any event, the Texas model is seriously flawed for several reasons. First, it would require direct FCC adjudication of "discrimination" complaints. The Commission cannot do this in a timely manner. The model also presumes that the Commission has direct authority over building owners and can enter orders setting compensation and other terms binding on owners. As discussed in our Further Comments, the Commission cannot do this.

Second, the Texas rules establish seven factors to be used in setting compensation to be paid to a building owner. These factors would potentially tie compensation to the amount of

[102] SBPP Comments at 35.

space to be occupied in the building and the rate for tenant space in the property. Other factors include the value of the property before and after installation of the facilities; any potential loss to the owner form giving up the space; and the building owner's costs related to installation of the equipment; among others. The list is incomplete and several of the factors are entirely inappropriate.[103]

When a building owner allows a provider to occupy space in a building in a competitive environment, the building owner is entitled to be paid a fair market rent for the space. The Texas factors are designed not to set a fair market rent, but to create arguments for reducing the amount to be paid the owner. The list omits the single most important factor in setting rent, which is the value to the provider of obtaining access to the building.[104] As noted earlier, building owners expend large sums of money to create environments that are attractive to tenants, and therefore to service providers. Telecommunications providers use access rights to reap great rewards from the building owner's efforts, and because they use access rights not to store inventory or house employees but to deliver services, they use the underlying property in a way fundamentally different from that of ordinary tenants. Providers have been willing to pay rent based on gross revenues because they understand that the value of access to a particular property is tied directly to its revenue potential. The value of access to an office building to deliver telecommunications

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[103] It is important to keep a critical distinction in mind. When a property owner lets a telecommunications provider occupy space in a building on a periodic basis, as is typical under a license or similar arrangement, the provider is paying rent; the provider is not paying compensation for acquiring a permanent property right. Consequently, the compensation must be evaluated in the context of how rent is typically determined. If a provider wants the benefit of a permanent right to occupy the property, it must either purchase an easement or condemn an easement, in which compensation will be set using different standards. The factors do not consider this issue at all, and indeed seem to blur the distinction. For one thing, the grant of a permanent right will presumably cost more than a temporary one.

[104] *See, e.g.*, *Rodriguez v. Costa Rica*, 99 F.Supp. 2d 170 (D.P.R. 2000) (rent for commercial use of property greater than for residential use of same property).

service is analogous to the value of a retailer's right to occupy space in a shopping center, because it provides direct access to a large body of potential customers.[105]

Consequently, the market rate for tenant leasable space in a property is of little value in setting the rent for a telecommunications provider's access rights; the uses are too different to be comparable. Similarly, while a building owner may seek to ensure that the costs associated with a provider's presence are covered, those costs ultimately may have little to do with the actual rent to be paid.

It is also important to bear in mind that in a free market, rent will be based on negotiations, and all parties are presumed capable of determining and protecting their own interests. Owners know that they have to have telephone service in a building, and will take that into account in dealing with a provider. But it is indisputable that the presence of the tenth provider offers the owner less than the presence of the first. The Commission cannot adequately set a value on such matters, at least not any more efficiently than can market negotiations. The Texas list's omission of the value to the provider perfectly illustrates why the government should

[105] *See, e.g.*, *A.H. Phillips Co., Inc. v. Commission*, 36 T.C.M. (CCH) 638 (1977) (noting that volatile businesses will pay high percentage rents and relatively low fixed rents); 12 Thompson on Real Property, Thomas Edison (David A. Thomas, ed. 1994), § 97.06(c)(16)(ii); Saft, Commercial Real Estate Leasing (1992), § 3.06; Powell on Real Property (2000) ch. 17A.

not try to regulate building access.[106]

B Massachusetts.

The Massachusetts rules were briefly mentioned by AT&T, but as far as the Alliance could determine, were not endorsed by any party. In any event, those rules are flawed for several reasons, chiefly because they rest on the DTE's counterintuitive conclusion that the term "utility" in the Massachusetts pole attachment statute includes building owners. The rules have been challenged in court by the Alliance and local real estate associations and we expect them to be overturned.

C. Connecticut.

The Connecticut rules also have not been endorsed by any party, and as far as we know have never been applied. Accordingly, it would appear that even the CLECs do not consider them a useful model. Furthermore, the Connecticut rules were adopted pursuant to a statute that expressly acknowledged that the rules would effect a taking of private property and consequently

[106] SBPP's proposal that the Commission set benchmark rates for building access is wholly unworkable. SBPP comments at 38. Ironically, SBPP's example of cable rate regulation illustrates this perfectly. The Commission's cable rate regulation scheme proved to be utterly ineffective: it imposed administrative burdens on cable operators and local franchising authorities, while doing nothing to limit rate increases, and the Commission has proven unable to resolve rate dispute in anything close to a timely manner. Furthermore, as we noted in the Further Comments, the FCC processes such complaints very slowly. Our analysis of cable rate decisions issued in 2000 shows that on average, it took the FCC 64 months to complete its review. Further Comments, Ex. I. Our most recent analysis of all cable rate orders is more favorable: it appears that, on average, it has taken the FCC 19 months to decide cable rate cases. This is still inordinately long, and far longer than the 3-6 months the market takes to resolve building access negotiations. We cannot think of a worse model. We support that it takes the Commission at least as long to handle other types of cases, including OTARD petitions and pole attachment cases. The FCC is simply not capable of resolving disputes quickly or efficiently.

authorized the Department of Public Utility Control to set compensation. The FCC has no comparable authority.

D. Nebraska.

The only parties to endorse the Nebraska rules appear to have been Cox, which was instrumental in having them adopted, and SBPP.[107] The Nebraska rules apply only to residential property. In addition to banning exclusive contracts, Nebraska provides for moving the demarcation point to the minimum point of entry, and for allocating the cost of wiring if the MPOE is moved. The decision to ban exclusive contracts in residential buildings was an unfortunate error, for the reasons discussed above. The rules offer no benefit to tenants, and are not a useful model for the Commission.

E. Florida.

The Florida Public Service Commission ("FPSC") filed comments urging the FCC to ban residential exclusive contracts and making suggestions for nondiscriminatory access rules, among other issues. The FPSC alleges that "[e]xclusionary contracts bar access to tenants by any competitors. Exclusionary contracts are inherently anticompetitive and should, therefore, be prohibited…."[108] This statement has no basis in fact, and is purely an expression of uninformed opinion. The report cited by the FPSC is conclusory and contains no analysis to justify such a statement. In addition, we note that the FPSC never adopted rules of its own, despite having conducted an extensive examinations of the issue. The FPSC's recommendations are now two years old, and the state legislature has never acted on them.

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[107] Cox Comments at 15; SBPP Comments at 33.

[108] FPSC Comments at 2.

X. SBPP MISSTATES THE NATURE AND EFFECT OF THE REIT MODERNIZATION ACT.

Faced with the prospect of competition from BLECs, who have developed a different business model, many CLECs fear that their strategy of building duplicative transmission infrastructure and treating building owners as adversaries may be ineffective, compared to a cooperative strategy that emphasizes providing facilities and services that tenants need. Consequently, they have resorted to alleging that building owners and the BLECs have created an anticompetitive alliance, and that the only way to stop this alleged juggernaut is to grant traditional CLECs access to buildings on their own terms.

As we stated in the Further Comments, the RAA's purpose is to protect the property rights of building owners, and we believe that the BLECs can defend themselves perfectly well. We also believe that the Commission will recognize that BLECs still represent only a small part of the market, and that their business practices and relationships with building owners will provide competition and benefit end users. Nevertheless, SBPP has made one particular claim regarding the REIT Modernization Act (the "RMA") that must be corrected.

SBPP alleges that the RMA (1) allows REIT subsidiaries to provide telecommunications services without jeopardizing their tax status; (2) consequently, the BLEC industry will experience "staggering growth;" and (3) consequently, building owners are well-positioned to exploit their "access-to-tenant" bottleneck."[109]

These three statements are at best misleading, and at worst false. To begin, some background. When Congress created REITs in 1960, it recognized that it was necessary for a building owner to provide basic services to make the living space habitable. Thus, Congress

[109] SBPP Comments at 7-8.

authorized REITs (even though they were originally intended to be "passive" in nature) to provide either directly or through a third party basic services such as electricity, water, air conditioning and telephone service. The Internal Revenue Code and relevant Treasury Regulations characterized any income generated from such services as "rents from real property," a key requirement for being a REIT.

Over the years, the IRS issued guidance clarifying which services qualified as utilities, such as a REIT using its own PBX to provide telecommunications services or a REIT submetering electricity or water.[110] In 1996, the IRS issued the first private letter ruling that concluded that an apartment REIT could provide cable television services to its residents under the theory that cable television was similar to the utility services long recognized as customarily provided by building owners.[111] In January 1999, the IRS issued Private Letter Ruling 199914038 concluding that an office REIT can provide (either directly or though a joint venture with a third party) high speed Internet and similar services to its tenants. Again, the IRS concluded that these services were akin to utility services.[112]

Congress enacted the REIT Modernization Act of 1999 to simplify a REIT's organizational structure and to allow a REIT to offer "cutting edge" services to its tenants through a taxable corporation:

> The Committee believes, however, that certain types of activities that relate to the REIT's real estate investments should be permitted to be performed under the control of the REIT, through the establishment of a "taxable REIT subsidiary" where there are rules which limit the amount of the subsidiary's income that can be reduced through transactions with the REIT…. One type of

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[110] *See, e.g.*, Treas. Reg. § 1.856-4(b)(1); Rev. Rul. 74-353, 1974-2 C.B. 200.

[111] *See* Priv. Ltr. Rul. 9640007 (June 26, 1996).

[112] *See also* Priv. Ltr. Rul. 200103033 (Oct. 17, 2000); Priv. Ltr. Rul. 200101012 (Sep. 30, 2000); Priv. Ltr. Rul. 200052028 (Sep. 29, 2000); Priv. Ltr. Rul. 199935071 (June 3, 1999); Priv. Ltr. Rul. 199917039 (Jan. 29, 1999).

> activity is the provision of tenant services that the REIT wishes to provide in order to remain competitive that might not be considered customary because they are relatively new or "cutting edge". The Committee believes that provision of tenant services by taxable REIT subsidiaries will simplify such rentals operations since uncertainty whether a particular service provided by a subsidiary is "customary" will not affect the parent's qualification as a REIT.

S. Rep. No. 106-201, 57-58 (1999).

Now, as to SBPP's specific claims. First, the RMA did not authorize REITs to provide telecommunications services to their tenants. Private Letter Ruling 1999141038 was issued well before the RMA was enacted in November 1999. In other words, although the RMA authorizes REITs to establish subsidiaries to provide certain kinds of services, it did not authorize REITs to provide telecommunications services without jeopardizing their tax status because they already had the ability to do so directly. SBPP is aware of this, because a few weeks before the RMA was enacted, representatives of several leading CLECs asked Congress to amend the RMA to condition a REIT's use of a taxable REIT subsidiary ("TRS") on the TRS adopting a "nondiscriminatory" standard in providing telecommunications services. Congress rebuffed these efforts after NAREIT and a Treasury Department official educated policymakers that a TRS was not necessary to provide telecommunications services because REITs could do so without the use of a TRS. For that reason, although it is possible that REITs may choose to use TRSs to provide telecommunications services to third parties, there would be no need for a REIT to establish a TRS to serve its own tenants.[113]

[113] In addition, even with the changes made in the RMA, a REIT can hold up to 10% of the vote or value of the stock of another corporation without regard to whether that corporation elects TRS status. To our knowledge, no REIT owns more than 10% of the stock of a BLEC, so that a REIT may continue to do so. We are unaware of any instance in which a REIT has transferred its stock in a BLEC to a TRS.

Second, the RMA does not encourage REITS to invest in BLECs, and will not cause BLECs to grow at a "staggering rate." Many REITs had invested in existing BLECs before the RMA was enacted, so the RMA has little, if anything, to do with that phenomenon. It is true that few, if any, REITs provided high speed Internet or other advanced services to tenants until the IRS issued its January 1999 private letter ruling. The IRS has issued a number of rulings since then allowing such services, so it appears that more REITs are interested in providing these services to tenants – this is not staggering growth, however. Indeed, NAREIT reports that its members estimate that the total revenue from all sources for TRSs in 2001 will amount to less than 5% of the REITs' total revenue. Since telecommunications revenue will be dwarfed by other TRS sources of revenue (such as management fees for operating property for other owners), this means that TRS telecommunications income in 2001 should be miniscule. Even if it grows over time, this will not be a large sum in the context of the overall priorities and income of REITs. Consequently, it is unlikely that the RMA will dramatically alter the telecommunications landscape.

Finally, the large majority of office and residential buildings are owned by privately-held companies, rather than REITs. Consequently, even if REITs did have certain incentives or ultimately behaved in ways that might concern CLECs, the RMA will have no effect on non-REIT owners. Thus, to claim that the passage of the RMA poses an enormous threat to competition and will encourage building owners to "exploit" their alleged "bottleneck" is a vast exaggeration.

CONCLUSION

Tenants are getting the services they want. Building owners are giving CLECs and other providers access to buildings, in response to tenant demands. Commission regulation of building access is unnecessary. This proceeding should be terminated.

Respectfully submitted,

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LIST OF EXHIBITS

EXHIBIT A	Implementation Report
EXHIBIT B	Lyle Declaration
EXHIBIT C	Business Tenant Survey
EXHIBIT D	Boston Globe Article